PD-1015-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/2/2019 5:03 PM
Accepted 1/4/2019 12:14 PM
DEANA WILLIAMSON
CLERK

NO. PD-1015-18

FILED
COURT OF CRIMINAL APPEALS
1/4/2019
DEANA WILLIAMSON, CLERK

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

**Ralph Watkins,
Appellant
VS.**

**State of Texas,
Appellee**

Appellant's Brief on Merits

**From Tenth Court of Appeals (Waco) No. 10-16-00377-CR, and
From Cause No. D36507-CR, in the 13th District Court, Navarro County**

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Oral Argument Requested

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

Identity of Parties and Counsel

1. Trial Judge: The Honorable James Lagomarsino, Presiding Judge of the 13th Judicial District Court of Navarro County, P.O. Box 333 Corsicana, Texas 75151.

2. Appellant: Ralph Dewayne Watkins, TDCJ #02096743, 2664 FM 2054, Tennessee Colony, TX 75886.

3. Counsel for Petitioner/Appellant:

a. The Appellant was represented at the Trial Court by Michael Crawford, Attorney at Law, 416 N 14th St, Corsicana, TX 75110

b. Appeals: J. Edward Niehaus, 207 W. Hickory St. Suite 309, Denton, Texas 76201.

4. Counsel for the State of Texas:

a. Trial and Appeal: The State is represented on appeal by and through Will Thompson, acting Criminal District Attorney of Navarro County, 300 W. 3rd Avenue Suite 203, Corsicana, TX 75110.

Statement Regarding Oral Argument

Oral argument is requested. While Counsel provides detailed briefing, oral argument is likely to provide significant benefit to the Court in its decisional process.

Statement of Case

Appellant was convicted of (lesser-included) possession of a penalty group one controlled substance in an amount greater than four grams but less than 200 grams and sentenced to seventy (70) years confinement as a habitual felon offender. Appellant timely filed notice of appeal to the Tenth Court of Appeals, Waco.

In the Court of Appeals, Appellant raised three issues: first, he challenged the Court's admission of punishment evidence the State withheld from discovery, alleging a violation of the Michael Morton Act. Second and Third he contested the Court's assessment of restitution and repayment of his court-appointed attorney's fees. Appellant prevailed on the restitution and attorney's fees issues.

The Tenth Court of Appeals applied the pre-Morton Act materiality standard to the undisclosed evidence, and by applying that standard found that the undisclosed punishment evidence was not material. So finding, they affirmed the seventy-year sentence. *Watkins v. State*, 554 S.W.3d. 819 (Tex. App. – Waco, July 25, 2018). Appellant filed a Motion for Reconsideration, which was denied on August 22, 2018 in a separate, published opinion. *Watkins v. State*, 554 S.W.3d. 819 (Tex. App. – Waco, August 22, 2018).

Appellant raised one issue in his Petition for Discretionary Review: did the Court of Appeals err in applying the pre-*Morton* definition of materiality to the undisclosed evidence? This Court ordered briefing on December 5, 2018.

ISSUE PRESENTED

While reviewing a violation of the Michael Morton Act, the Court of Appeals erred in its materiality analysis.

NO. PD-1015-18

IN THE
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STATEMENT OF FACTS and PROCEDURAL HISTORY

Before trial, Counsel specifically requested discovery pursuant to the Michael Morton Act, (CR p19 – 20). The Clerk Record contains a recitation of the evidence made available to the Defense, signed by both defense counsel and the State, (CR p79 – 81). Appellant was convicted of a lesser-included possession of controlled substance, a second-degree felony with a punishment range of 2 – 20 years and a fine not to exceed $10,000.

During punishment, the State offered thirty-four (34) exhibits. Only two (2) of those exhibits were disclosed in the State's Article 39.14 disclosure, (CR p79 –

81; RR v8 p11 – 18). Trial counsel timely objected, (RR v8 p11 – 18). These punishment exhibits proved Appellant to be a habitual offender. Appellant was sentenced as a habitual offender to seventy (70) years confinement. (CR p67; RR v8 p 81 – 83).

On direct appeal, the Tenth Court of Appeals applied the pre-Morton Act materiality standard to the undisclosed evidence, and by applying that standard found that the undisclosed punishment evidence was not material. So finding, they affirmed the seventy-year sentence.

Appellant's Petition for Discretionary Review was granted on December 5, 2018. This brief follows.

SUMMARY OF THE ARGUMENT

In Section I of this brief, Appellant asserts the Court of Appeals erred in its materiality analysis while reviewing a violation of the Michael Morton Act. Appellant urges the Court to consider the legislative history and legislative intent behind the Michael Morton Act to conclude that materiality is no longer limited to *Brady* evidence. Appellant suggests that the *Brady* standard was moved to Article 39.14(h). However, before reaching the legislative history, the Court must find the statutory language to be ambiguous. Appellant asserts ambiguity in the current version of Article 39.14. Because that ambiguity exists, Appellant argues the Court

should consider extra-textual factors. In considering extra-textual factors, Appellant asserts that the materiality standard used by the Tenth Court of Appeals is erroneous as applied to Article 39.14(a) because it renders Article 39.14(h) superfluous, does not give effect to the amendment passed by the legislature, and fails to adequately account for the change in the broader context in which the materiality provision appears.

In Section II, Appellant analyzes the history of Article 39.14 to determine how to reconcile the Court's precedent with the significantly broader language in the current version of Article 39.14. Appellant proposes an interpretation that utilizes Article 39.14(h) as a codification of the requirements of *Brady* and its progeny.

In Section III, Appellant crafts and applies a new definition of materiality for purposed of Article 39.14(a). Appellant proposes a definition of materiality that gives effect to the Michael Morton Act without the need to overturn the Court's existing Article 39.14 jurisprudence by suggesting that the pre-Morton cases can be used for violations of Article 39.14(h). Appellant suggests standards for determining error and a possible remedy for violations of Article 39.14.

ARGUMENT

ISSUE ONE: ***The Court of Appeals erred by applying the pre-Michael Morton Act standard for materiality to a violation of the Michael Morton Act.***

Standard of Review

Statutory interpretation is a question of law that is reviewed *de novo*. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); *Clinton v. State*, 354 S.W.3d 795, 799 (Tex. Crim. App. 2011).

Classification of Rule 44 Error

Violation of the amended version of Article 39.14(a) is a statutory violation, not a constitutional violation. Therefore, the non-constitutional error standard applies. Since, in this case, Appellant is not raising a Constitutional error, the standard of review is, "any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." TEX. R. APP. P. 44.2(b)

In Section III(B)(2), Appellant discusses the possibility that a violation of Article 39.14(h), which incorporates the pre-Morton requirement to disclose *Brady* evidence, may be constitutional (due process) error. TEX. R. APP. P. 44.2(a) Here, we have a violation of Article 39.14(a), which should be reviewed as non-constitutional error. TEX. R. APP. P. 44.2(b).

Fact Statement

Code of Criminal Procedure article 39.14(a) was enacted in 1965, and amended in 1999 and 2005. The Morton Act was authored by Senators Rodney Ellis

and Robert Duncan. In the Senate, the bill was reviewed and passed[1] by the 2013 Texas Senate Criminal Justice Committee that consisted of seven members, including four Republicans (Joan Huffman, John Carona, Dan Patrick, and Charles Schwertner) and three Democrats (John Whitmire [Chair], Juan Hinojosa, and Jose R. Rodriguez)

The bill was passed unanimously by the 2013 Texas House Judiciary & Civil Jurisprudence Committee, who members included five Republicans (Tryon Lewis, [Chair], Marsha Farney, Lance Gooden, Todd Hunter, and Ken King) as well as four Democrats (Jessica Farrar [Vice-chair], Ana Hernandez, Richard Raymond, and Senfronia Thompson).

The Michael Morton Act was signed by Governor Perry, effective January 1, 2014. The legislature heavily amended the statute but elected to carry forward certain terms and phrases.

After that effective date of the Morton Act, Mr. Watkins was arrested and charged with manufacture/delivery of controlled substance in an amount between 4 and 200 grams (CR p8, 18). Counsel specifically requested discovery pursuant to the Michael Morton Act, (CR p19 – 20). The Clerk Record contains a recitation of the

[1] Five in favor, one against, one absent. *See* *https://capitol.texas.gov/BillLookup/History.aspx?LegSess=83R&Bill=SB1611* (last visit 12/28/2018)

evidence made available to the Defense, signed by both defense counsel and the State, (CR p79 – 81). That list does not include withheld evidence, (CR p79 – 81). Ultimately, Mr. Watkins was convicted of the lesser-included offense of possession of controlled substance $\geq 4g \leq 200g$, a second-degree felony.

Mr. Watkins appealed his conviction to the Tenth Court of Appeals. There, the Court of Appeals recognized the confusion created by the Michael Morton Act. It is the election to carry forward the phrase "constitute or contain evidence material to any matter involved in the action" resulted in confusion among both the trial courts and courts of appeals. As the presiding judge stated in overruling trial counsel's Article 39.14 objection:

> THE COURT: Here's what I'm going to do. Mr. Crawford, when the jury's verdict was received I think after the jury was discharged you indicated that your client would be appealing. I was, it was a statement and I know that after this punishment hearing you'll make that formal notice. Since that, this case is going to be appealed, maybe this is not the proper thing to say, but maybe this is an issue for the Court of Appeals to address and give, I'm not setting this up to be a test case. But, you know, Mr. Kingman made some points. And we are left with this kind of a, we don't know what to do with it. I'm going to vacate my previous ruling. 1 through 18 will be admitted. You'll have a running objection. And maybe we'll get some clarification from individuals that can tell us all how to go about this.

(RR v8 p18).

The Court of Appeals, after briefing, argument, amicus briefing, and supplemental briefing, concluded that they were "constrained to hold that the

definition or standard we must use to determine whether the objectionable evidence was material is the same after the passage of the Michael Morton Act as it was before passage." *Watkins v. State* 554 S.W.3d 819, 821 (Tex. App. – Waco July 25, 2018).

Arguments and Authorities

While reviewing a violation of the Michael Morton Act, the Court of Appeals erred in its materiality analysis.

I. The Court of Appeals erred by interpreting the changes made to Article 39.14(a) by the Michael Morton Act as a recodification of the pre-Morton Act *Brady* materiality standard for obtaining discovery in a criminal case.

The Tenth Court of Appeals erred by concluded that "'material' had been subject to substantial judicial interpretation prior to the debate and passage of the Michael Morton Act. Thus, applying well-established precedent from the Court of Criminal Appeals, by which this Court is bound, we are constrained to hold that the definition or standard we must use to determine whether the objectionable evidence was material is the same after the passage of the Michael Morton Act as it was before passage, regardless of what the Legislature may have thought or intended to accomplish." *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App – Waco July 25, 2018).

On Appellant's Motion for Rehearing, the Court concluded that "[t]he legislature did not change a term in the existing statute that had already been

interpreted by the State's highest court in criminal matters. As we explained in our opinion, we do not write on a clean slate. If we did, we may very well utilize the interpretive tools and analysis suggested by the Amicus Curiae on rehearing as well as the Amicus Curiae brief on original submission filed by the State Prosecuting Attorney." *Watkins v. State*, 554 S.W.3d 819, 824 (Tex. App – Waco, August 22, 2018)(op. on mtn for reh'g).

Appellant contends this conclusion is incorrect.

A) Canons of statutory construction support an alteration to the definition of 'materiality'

Canons of statutory construction prohibit applying the pre-Morton Article 39.14(a) definition of materiality to the language of Article 39.14(a) as amended by thee Michael Morton Act.

1) By reading subsection (a) as incorporating the pre-Morton Act materiality requirement, subsection (h) is rendered superfluous.

"We must presume that "in enacting a statute, the Legislature intends the entire statute to be effective[,]" and did not intend a useless thing." *Garza v. State*, 213 S.W.3d 338, 349 (Tex. Crim. App. 2007) ("We must presume that 'in enacting a statute, the Legislature intends the entire statute to be effective[,]' and did not intend a useless thing.") (quoting *Heckert v. State*, 612 S.W.2d 549, 552 (Tex. Crim. App. 1981)). *See also Delay v. State*, 465 S.W.3d 232, 250 (Tex. Crim. App. 2014). If the

materiality standard did not change, the Morton Act accomplishes no alteration to criminal discovery in Texas; the Legislature did a useless thing. Interpreting Article 39.14(h) as a codification of *Brady* resolves this problem and allows the Court to give effect to the Morton Act.

2) Canons of construction require no provision of the Michael Morton Act be rendered superfluous.

"In applying the pertinent canons of construction, we must presume the Legislature intended for the entire statute to be effective and to produce a just and reasonable result." *Clinton v. State*, 354 S.W.3d 795, 801 (Tex. Crim. App. 2011). *See* TEX. GOV'T CODE § 311.021

Among the canons of construction is a list of presumptions regarding legislative intent. *See* TEX. GOV'T CODE § 311.021. Under these canons, in the Legislature's enactment of a statute, it is presumed that (1) compliance with the constitutions of this state and the United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest. *Id.*; *Delay v. State*, 465 S.W.3d 232, 250 (Tex. Crim. App. 2014); *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011). The Court of Appeals error primarily implicates the second of these considerations. By using the pre-Morton definition of materiality,

the creation of subsection (h) and amendment to subsection (a) are not effective **unless** the Court treats 39.14(h) as a codification of *Brady* and 39.14(a) as creating a different standard for less than constitutionally material discovery.

3) Michael Morton Act subsection (h) incorporates the *Brady* material-evidence standard, requiring disclosure of that evidence without regard to the triggering request in subsection (a).

The State's obligations under *Brady* are well known. "The State has an affirmative duty to disclose evidence favorable and material to a defendant's guilt or punishment under the Due Process Clause of the Fourteenth Amendment. This duty attaches with or without a request for the evidence. When unsure of whether to disclose the evidence, the prosecutor should submit the evidence to the trial judge for his consideration." *Thomas v. State*, 841 S.W.2d 399, 407 (Tex. Crim. App. 1992)(internal citations omitted). The *Brady* standard is adopted in Article 39.14(h), which reads: "Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." TEX. CODE CRIM PROC. ANN. ART. 39.14(h).

If Article 39.14(a) is limited to *Brady* evidence, then subsection (h) unnecessary. As the State Prosecuting Attorney argued in the Court of Appeals, "[t]he 2014

addition of subsection (h) is proof that the Act was not intended to (re)codify *Brady*. Subsection (h) requires disclosure of "any exculpatory, impeachment, or mitigating" thing that "tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." This parallels the *Brady* formulation but adopts a lower standard for disclosure than *Brady* materiality." Br. of St. Pros. Atty. at 19 – 20, *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App – Waco 2018)(No. 10-16-00377-CR) *citing* TEX. CODE CRIM PROC. ANN. ART. 39.14(h).

B) *Using different materiality standards for violations of Article 39.14(a) and 39.14(h) best gives effect to the legislative action.*

Using a new materiality standard gives effect to the Michael Morton Act. Applying the pre-Morton definition of materiality fails to give effect to the legislative action amending the statute.

When interpreting statutory language, the Court focuses on the "'collective' intent or purpose of the legislators who enacted the legislation." *Clinton v. State*, 354 S.W.3d 795, 799 (Tex. Crim. App. 2011). By interpreting the Morton Act to encompass only discovery previously available under the pre-Morton good cause/constitutional-materiality standard, the Court failed to give effect to the legislative action amending the scope and availability of criminal discovery.

1) Amending a statute evidences legislative intent to change the law.

"In enacting an amendment[,] the Legislature is presumed to have changed the law, and a construction should be adopted that gives effect to the intended change, rather than one that renders the amendment useless." *Ex parte Trahan*, 591 S.W.2d 837 (Tex. Crim. App. 1979) *citing Stolte v. Karren*, 191 S.W. 600 (Tex. Civ. App. San Antonio 1917, *writ ref'd*); *McLaren v. State*, 82 Tex. Crim. 449, 199 S.W. 811 (1917). When the Court of Appeals applied the pre-Morton materiality standard, they rendered the amendment to Article 39.14 useless.

2) Amendment to Article 39.14(a) was not part of a statutory revision program but was rather an intentional alteration to the function and scope of Article 39.14(a).

Amending a statute with the intent to alter the statute is different from amending the statute for purposes of clarifying the statute. *See Avery v. State*, 341 S.W.3d 490 (Tex. App. – Corpus Christi, 2011)(*aff'd by* 359 S.W.3d 230 (Tex. Crim. App. 2012)). This distinction is codified in Section 323.007 of the Government Code. "The [Texas Legislative] council shall plan and execute a permanent statutory revision program for the systematic and continuous study of the statutes of this state and for the formal revision of the statutes on a topical or code basis. The purpose of the program is to clarify and simplify the statutes and to make the statutes more accessible, understandable, and usable." TEX. GOV'T CODE § 323.007. This

Government Code provision allows for non-substantive changes to statutes by reorganizing, renumbering, and clarifying statutory language.

One example of recodification without substantive amendment is the recent renumbering of the community supervision statute. *See* 2015 Tex. HB 2299. That act repealed Article 42.12 of the Code of Criminal Procedure and replaced it with Article 42A of the Code of Criminal Procedure without making substantive changes. In contrast, the substantive amendment to article 39.14(a) in the Michael Morton Act (2013 Tex. SB 1611) was passed to expand criminal discovery and provide a greater access to information. *See* S.J. of Tex., 83rd Leg., R.S. 818 – 824 (2013)(statement of intent during address of Rodney Ellis, bill author).

3) Removing the good cause requirement from Article 39.14(a) significantly broadened the scope of criminal discovery and did not recodify the existing discovery standard.

The Court presumes that each word of the statute has been chosen for a purpose by the Legislature and must be given effect if reasonably possible. *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). The Court must also consider words **removed** from the statute. "In enacting an amendment the Legislature is presumed to have changed the law, and a construction should be adopted that gives effect to the intended change, rather than one that renders the amendment useless." *Ex parte Trahan*, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979)

"The Legislature greatly enlarged the first section [of Article 39.14]. No longer must the defendant show good cause." Jessica Caird, *Significant Changes to the Texas Criminal Discovery Statute*, 51 HOUS. LAW. at 10 – 11 (2014)(hereafter cited as "*Significant Changes*"). Removing the good cause requirement and greatly expanding the scope of the statute both indicate an intent to broaden discovery, which cannot be accomplished unless materiality means something other than what it did prior to the Morton Act.

Application of the pre-Morton materiality standard is also inconsistent with the author's stated goal for the legislation. That goal, as Senator Ellis stated, was to "remove[] barriers to discovery processes in Texas to ensure a more relevant evidence procedure comes forward and **evidence that is relevant will be disclosed**; it has to be disclosed." S.J. of Tex., 83rd Leg., R.S. 818, 819 (2013)(emphasis added). Senator Ellis submitted that the proper standard was commonly understood materiality, not due-process (*Brady*) materiality. *Id*. The Tenth Court of Appeals indicated a similar definition in its opinion on direct appeal. They would define the Morton Act's materiality standard "at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of a trial." *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App. – Waco, July 25, 2018). Any of these definitions gives better effect to the legislative

intent than using the pre-Morton standard.

C) Removing the "good cause" qualifier results in the ambiguity regarding the materiality standard contained in Article 39.14(a).

Statutory interpretation is a question of law that this Court reviews *de novo*. *Clinton v. State*, 354 S.W.3d 795, 799 (Tex. Crim. App. 2011). When interpreting statutory language, the Court focuses on the "'collective' intent or purpose of the legislators who enacted the legislation." *Id*. at 800 (*citing Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)). To determine the collective intent of the legislators, we begin by examining the literal text. *Id*.; *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). However, if the meaning of the literal text of a statute would cause an absurd result or is ambiguous, we may consider extra-textual factors to discern the Legislature's intent in enacting the statute. *Bays v. State*, 396 S.W.3d 580, 585 (Tex. Crim. App. 2013).

Appellant asserts the text of Article 39.14(a) is ambiguous. "A statute is ambiguous when the language it employs is reasonably susceptible to more than one understanding. But before we declare a word that has more than one plausibly applicable definition sufficient to render a statute ambiguous, and therefore subject to interpretation by extra-textual factors, we must broaden our examination to the setting in which the word appears, in order to determine whether context makes clear

which definition the Legislature intended." *Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013). Context matters. Indeed, the confusion evidenced by the trial court, the prosecutor, and trial counsel regarding what evidence is or is not covered is at least some evidence of ambiguity.

1) Materiality has multiple definitions that fit the statutory language and is susceptible to more than one meaning.

Materiality has multiple definitions. These include "[i]mportant," "having influence or effect," "going to the merits." *See* BLACK'S LAW DICTIONARY, p. 880 (Special Deluxe 5th Ed. 1979).

In contrast, for *Brady* purposes 'material' means it created a probability sufficient to undermine confidence in the outcome of the proceeding. *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992). *Brady* mandates a higher standard for 'material' evidence because a *Brady* violation implicates due process. *Id*. The Michael Morton Act is a statutory entitlement to discovery designed to improve access to discovery that does not rise to the level where due process mandates disclosure. *See* S.J. of Tex., 83rd Leg., R.S. 818, 819 (2013)(Statement of intent by Rodney Ellis, bill author).

Dissenting in *Quinones v. State*, Justice Roberts evidenced his understanding of the problem with creating a criminal-law specific definition of materiality. There, he noted:

> Materiality in the context of Article 39.14 should be accorded its commonly understood legal meaning. As said in *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956), "(T)o be 'material' means to have probative weight: i.e., reasonably likely to influence the tribunal in making a determination required to be made." Accordingly, the cases cited by the Court are inapposite. The Legislature has chosen, by enacting Article 39.14, to authorize a broader range of discovery than the minimum due process requirements of *Brady v. Maryland*.

Quinones v. State, 592 S.W.2d 933, 947 (Tex. Cr. App. 1980)(Roberts, J. Dissenting).

Much of what Justice Roberts' dissent argues is mirrored in Senator Ellis' comments prior to the final vote on the Michael Morton Act. Speaking in front of not only the Senate, but also Mr. and Mrs. Morton, Senator Ellis stated that the Act "removes barriers to discovery processes in Texas to ensure a more relevant evidence procedure comes forward and **evidence that is relevant will be disclosed**; it has to be disclosed." S.J. of Tex., 83rd Leg., R.S. 818, 819 (2013)(address of Rodney Ellis, bill author)(emphasis added).

2) The phrase "*that constitute or contain evidence material to any matter involved in the action*" in the Michael Morton Act is taken out-of-context from how the phrase appeared in the predecessor version of Article 39.14.

When determining whether an amendment was a change or clarification, we may review the legislative history and former statutory provisions. *Ex parte Ellis*, 279 S.W.3d 1, 28 (Tex. App. – Austin 2008) *citing* TEX. GOV'T CODE § 311.023 (West 2005). "[T]ext cannot be divorced from context. *Cadena Comercial USA Corp. v. Tex. Alcoholic Bev. Comm'n*, 518 S.W.3d 318, 353 (Tex. 2017). This is a straightforward, well-defined interpretive principle, one we have asserted frequently and applied assiduously. The law, after all, begins with language, and one cardinal rule of language—not just legal language but all language—is this: "Language cannot be interpreted apart from context."" *Id. citing TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011).

Review of the changes made is helpful. The red-lined version is included as Appendix A to this brief. The most immediate pre-Morton Act version and the Morton Act version in effect at the time of trial are below.

a) <u>The prior version of 39.14(a)</u>

> Upon motion of the defendant showing good cause therefor and upon notice to the other parties, except as provided by Article 39.15, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or

> tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies.

TEX. CODE CRIM. PROC. ANN. ART. 39.14(a)(LexisNexis 2011)

b) <u>The Michael Morton Act version of 39.14(a)</u>

> Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.

TEX. CODE CRIM. PROC. ANN. ART. 39.14(a) (LexisNexis 2013)

c) <u>The good cause requirement was inextricably linked to the use of the Brady materiality standard.</u>

Before the Morton Act, a showing of "good cause" made the trial court's refusal to permit discovery an abuse of discretion. The Court of Criminal Appeals used the prevailing *Brady* standard for materiality to measure "good cause." *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App. 1980); *see also* Br. of St. Pros. Atty. at 14, *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App – Waco 2018)(No. 10-16-00377-CR). This standard overlooks the distinction between the **constitutional**

entitlement to discovery established by *Brady* and its progeny and the **statutory** entitlement to discovery enacted by the Legislature.

The United States Supreme Court recognized as far back as *Agurs* that procedural rules may be adopted for more broad disclosure than the constitution requires. *See United States v. Agurs*, 427 U.S. 97 (1976). There, the Supreme Court noted that whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much. *Agurs*, 427 U.S. at 109 – 110. Appellant contends that the Michael Morton Act is exactly this type of procedural protection, codifying *Brady* in Article 39.14(h) and creating a new, lesser standard for non-*Brady* evidence triggered by request in Article 39.14(a).

d) An "open file" requirement is inconsistent with the requirement of Brady-*style materiality.*

After the Morton Act, "the enumerated items in the code are made available to the defendant as if in an open-file condition. The prosecutor must provide access to these items regardless of whether or not they negate or mitigate defendant's guilt. In that fashion, Article 39.14 has gone beyond the protections of *Brady*…." *See* 2-62 Texas Criminal Practice Guide § 62.01 (internal citations omitted). Restricting available discovery to that defined by *Brady* progeny as material is entirely inconsistent with the purpose of the Act. The goal of the Michael Morton Act was

to ensure 'open file' discovery policies in Texas. *See* Galvan, ***Now What?: A Guide To Navigating The Michael Morton Act's Seemingly Unconstitutional Pro Se Provision***, Texas Tech L. Rev. Vol. 48 p.423, 430. *See also* Grissom, Senate Unanimously Approves Michael Morton Act, Tex. Trib. (Apr. 11, 2013)[2]; Nellenbach, State Senators Ellis and Duncan Working Together to Reform the Texas Criminal Justice System, BIPARTISAN POL'Y CTR. (June 3, 2013)[3].

e) After the change to Article 39.14, the intended definition of materiality cannot be discerned from the text, and is therefore ambiguous

Appellate courts must construe a statute in accordance with the plain meaning of its text unless the language of the statute is ambiguous or the plain meaning would lead to absurd results that the legislature could not have possibly intended. *Price v. State*, 434 S.W.3d 601, 605 (Tex. Crim. App. 2014); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

The exact effect of removing the good cause requirement to obtain discovery as it relates to whether error occurred in the trial cannot be ascertained from review of the statutory language alone. "Ambiguity exists when a statute may be understood by reasonably well-informed persons to have two or more different meanings."

[2] Available at: http://www.texastribune.org/2013/04/11/senate-approves-michael-morton-act/ (last visit 12/10/2018)
[3] Available at http://bipartisanpolicy.org/blog/state-senators-ellis-and-duncan-working-together-reform-texas-criminaljustice-system (last visit 12/10/2018).

Cortez v. State, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); *see also Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013)(statutory language is ambiguous if "reasonably susceptible to more than one understanding"). Therefore, the statutory language, as amended, is ambiguous.

D) Because the Michael Morton Act language is ambiguous, the Court may look to extra-textual factors to determine its meaning.

If the language of a statute is ambiguous, or the plain meaning leads to such absurd results, then a court may consult extratextual factors. *Bryant v. State*, 391 S.W.3d 86, 92 (Tex. Crim. App. 2013); *Boykin*, 818 S.W.2d at 785. A statute is ambiguous when it is "reasonably susceptible to more than one understanding. *Chase v. State*, 448 S.W.3d 6, 11 (Tex. Crim. App. 2014). Here, the confusion regarding what the Morton Act did, or did not, do to the materiality standard is evidence of ambiguity.

1) Legislative history and statements of legislative intent

The Michael Morton Act was drafted, in the words of its primary author, because "Michael's tragic case brought to the forefront something that we already knew in Texas, but we too long neglected. Our criminal discovery process in Texas needs serious reform." S.J. of Tex., 83rd Leg., R.S. 818, 819 (2013)(Rodney Ellis statement of intent).

During the third reading of 2013 SB 1611, Senator Ellis, the primary author of the Michael Morton Act, stated: "…It removes barriers to discovery processes in Texas to ensure a more relevant evidence procedure comes forward and **evidence that is relevant will be disclosed**; it has to be disclosed." *Id.* (emphasis added).

With the exception of Senator Ellis' comments, the questions and discussion during the Legislature's third reading do not focus on the contents of subsection (a). Most questions and commentary focused on compliance with the Rules of Professional Conduct [subsection (g)] and prohibitions on providing the accused certain information [subsection (f)] *See* S.J. of Tex., 83rd Leg., R.S. 818, 823 – 826 (2013).

Ultimately, the consensus is that the Michael Morton Act fundamentally altered criminal discovery in Texas to expand both the ease of obtaining discovery and the scope of materials available.

2) Additional interpretations of the Michael Morton Act

As a landmark piece of bipartisan legislation, the Michael Morton Act drew significant commentary from both scholars and practitioners.

a) Dissenting opinion by Justice Alcala

In an early interpretive opinion, Justice Alcala, dissenting from denial of a writ of habeas corpus, interpreted the Michael Morton Act, stating, "the Legislature

passed the Michael Morton Act to ensure that defendants would receive discovery of the evidence the State had in its possession so that they could prepare a defense against it." *Ex parte Pruett*, 458 S.W.3d 537, 542 (Tex. Crim. App. 2015)(Alcala, J., Dissenting from denial of writ of habeas corpus).

b) Cardozo Law Review article

After the effective date of the Morton Act, the then-District Attorney of Dallas County Susan Hawk published a best practices guide. She opined: "The [Michael Morton] Act also imposes a continuing duty on the State to disclose exculpatory, impeachment, or mitigating information to the defense if it is in their possession, custody, or control **without regard to "materiality" as defined by Brady** and its progeny." Susan Hawk, *The Road to Adopting and Implementing Systemic Disclosure Changes in the Dallas County District Attorney's Office*, 2016 Cardozo L. Rev. 151. (emphasis added).

c) Texas Tech Law Review article by Gerald Reamey

"The 2013 amendments to article 39.14 significantly and substantially changed both the law and practice of criminal discovery in Texas." Gerald Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, Or Not*, 48 Tex. Tech L. Rev. 893, 926 (hereafter "*Fundamentally Change*"). The items and information producible under the Michael

Morton Act are far more varied than the disclosure required under *Brady v. Maryland. See Fundamentally Change* at 903.

d) St. Mary's Law Review article by Cynthia Orr and Robert Rodery

With the exception of the carve-outs, the new discovery scheme is relevance-based. It requires all information from the prosecution, its agents, and contractors that is material to any matter in the case. Orr & Rodery, *Recent Development: The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 St. Mary's L. J. 407, 415. (Hereafter "*Minimizing Misconduct*").

Before the Michael Morton Act, the state had no general duty to provide the defense pretrial access to the evidence in the prosecution team's possession or inform the defense as to the evidence available. *Minimizing Misconduct*, 46 St. Mary's L. J. at 412 *citing State ex rel. Holmes v. Lanford*, 764 S.W.2d 593, 593 (Tex. App. - Houston [14th] 1989, no pet.) ("There is no general right to discovery in a criminal case.") Indeed, "prior to the relevance-based discovery scheme in revised Article 39.14, prosecutors enjoyed a great deal of discretion in determining what constituted Brady material. Revised Article 39.14 attempts to eliminate hindsight arguments over what was, or should have been, produced by the opposing party in a proceeding." *Minimizing Misconduct*, 46 St. Mary's L. J. at 413. *See also* S. Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 1611, 83d Leg., R.S.

(2013)(recognizing both the fact that the Morton Act establishes a relevance-based discovery scheme and the defendant's strong constitutional right to present a full defense); H. Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 1611, 83d Leg., R.S. (2013) (same)[4]

II. Precedent and analysis of the history of criminal discovery support using *Brady* and its progeny to interpret Article 39.14(h) while crafting a new standard to interpret Article 39.14(a).

Much of the confusion over the meaning of materiality stems from the absence of a well-drawn distinction between (a) undisclosed evidence, and (b) undisclosed, *Brady* evidence. This is, in part, because undisclosed inculpatory evidence (i.e. undisclosed non-*Brady* evidence) will rarely become a part of the appellate record. In the same manner that all squares are rectangles but not all rectangles are squares: all *Brady* violations involve undisclosed evidence, but not every instance of undisclosed evidence is a *Brady* violation. This lack of clarity has been compounded by the imprecise distinction between the constitutional requirement to disclose evidence and the statutory availability of evidence.

One of the fundamental problems is the absence of a bright-line distinction between discovery of evidence a defendant is **constitutionally** entitled to versus

[4] Available at http://www.hro.house.state.tx.us/pdf/ba83R/SB1611.PDF (last visit 12/17/2018).

discovery of evidence a defendant may obtain by **statutory** authorization. *See Kinnamon v. State*, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990), *overruled on other grounds*, *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994). The addition of Article 39.14(h), which mirrors the constitutional materiality standard, gives this Court to opportunity to clarify the difference between statutory materiality and constitutional materiality.

In Section III of this brief, Appellant explains how the Court may interpret the Michael Morton Act by proposing a distinction between (i) constitutional-materiality evidence as defined by *Brady* until the enactment of the Michael Morton Act and (ii) statutory-materiality evidence as envisioned by the Michael Morton Act. Before reaching that, a quick history (similar to what the State Prosecuting Attorney's Office provided to the intermediate court of appeals) is helpful. *See* Br. of St. Pros. Atty. at 10 – 21, *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App – Waco 2018)(No. 10-16-00377-CR).

1963: *Brady v. Maryland,* 373 U.S. 83

The Supreme Court recognizes that the Due Process Clause requires disclosure of certain categories of evidence. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Brady frames the entitlement to evidence as a due process issue when the evidence is exculpatory. *Brady* does not create a statutory right to discovery. *Brady* recognizes a category of evidence that is constitutionally-material such that non-disclosure, after request, deprives the Defendant of his right to due process.

1965: Texas enacts Article 39.14

Texas enacts Article 39.14 of the Code of Criminal Procedure. That version of Article 39.14(a) applied to "objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action." Acts 1965, 59th Leg., p. 475, ch. 722, §1, eff. Jan. 1, 1966. The substance of this language has carried forward unchanged through to the Michael Morton Act. The current meaning of this phrase is disputed in this case.

1976: *United States v. Agurs*, 427 U.S. 97

The United States Supreme Court begins to restrict what evidence is 'material' when undisclosed. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427

U.S. 97, 112 (1976)(failure to disclose violent criminal history of murder victim not reversible error where no request for disclosure was made by trial counsel).

This holding can be rephrased: the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish a violation of Defendant's right to due process. "[T]o reiterate a critical point, the prosecutor will not have violated his **constitutional duty** of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's **right to a fair trial**" *United States v. Agurs*, 427 U.S. at 108 (1976)(emphasis added).

The focus on a constitutional duty to disclose contrasts with a statutory duty to disclose. The difference between a constitutional versus statutory entitlement to evidence was recognized as far back as *Agurs*. "Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much." *Agurs*, 427 U.S. at 109. This type of procedural rule, authorizing disclosure beyond constitutional entitlement, is exactly what the Texas Legislature created with the Michael Morton Act.

It remains true, even after the Morton Act, that the Constitution may not demand the breadth of disclosure permitted by the Michael Morton Act. However, we are not dealing with a constitutional entitlement. This case requires interpreting

the scope of the statutory entitlement the Legislature deemed necessary. The legislature may provide greater protection to a citizenry than the Constitution. *See Venn v. State*, 86 Tex. Crim. 633, 635, 218 S.W. 1060, 1061 (1920)("[The] Legislature … may enlarge those [Constitutional] rights to some extent as a means of carrying out the wish of the people as expressed in their ordained Constitution, but cannot abridge those rights.")

1980: Texas adopts *Agurs* in *Quinones v. State*, 592 S.W.2d 933

The Court of Criminal Appeals adopts the *Agurs* materiality standard, finding that the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.'" *Quinones v. State*, 592 S.W.2d 933, 941 (Tex. Cr. App. 1980). Again, this may be paraphrased: the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish a due process violation.

1985: *United States v. Bagley*, 473 U.S. 667

Constitutional-materiality is further defined so that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome."

United States v. Bagley, 473 U.S. 667, 682 (1985). *See also* Br. of St. Pros. Atty. at 11 – 12, *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App – Waco 2018)(No. 10-16-00377-CR). Again, this is the measure of materiality in the due process entitlement sense. *Bagley* may be restated: withholding evidence only violates the due process clause if, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Bagley also eliminated the difference between exculpatory and impeachment evidence for *Brady* purposes. *Bagley*, 473 U.S. at 685.

1992: Texas adopts *Bagley* in *McBride v. State* 838 S.W.2d 248

Texas adds a new layer is added to the discovery requirement. Now, the trial judge is required "to permit discovery if the evidence sought is material to the defense of the accused." *McBride v. State* 838 S.W.2d 248, 250 (Tex. Crim. App. 1992). A Defendant may show good cause to obtain discovery of evidence essential to the State's case, but it does not follow that the Defendant is constitutionally entitled to inculpatory evidence because inculpatory evidence is likely never "material" in the *Bagley* outcome-determinative sense. *See Medina v. State*, 743 S.W.2d 950, 957 (Tex. App. – Ft. Worth 1988).

1995: *Kyles v. Whitley*, 514 U.S. 419

"[T]he individual prosecutor has a duty to learn of any favorable evidence

known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). *Kyles* looks to materiality collectively. The materiality to be stressed here is the definition in terms of suppressed evidence considered collectively, not item by item. *Kyles v. Whitley*, 514 U.S. at 436 (1995).

In Section III of this brief, Counsel draws the distinction suggested in *Kyles*. The distinction between a **constitutional** requirement for an open file policy and a **statutory** right to discovery can be reconciled by review of the text of the Michael Morton Act. *See* Tex. Code Crim. Proc. Ann. art. 39.14(a), (h).

The Supreme Court has "never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Kyles v. Whitley*, 514 U.S. at 437 (1995) *citing* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the

punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense")(ellipsis retained from *Kyles*).

1996: Texas expands constitutionally-material discovery

A defendant "has a right to inspect evidence indispensable to the State's case because that evidence is necessarily material to the defense of the accused." *Massey v. State*, 933 S.W.2d 141, 153 (Tex. Crim. App. 1996) *quoting McBride v. State* 838 S.W.2d at 251. This conception of materiality includes all evidence that determines whether Defendant is guilty in addition to evidence which would tend to negate guilt or punishment. It is also consistent with the due process trend in the pre-Morton cases interpreting Article 39.14(a). *Massey*'s holding may be restated: a Defendant "has a [due process] right to inspect evidence indispensable to the State's case because that evidence is necessarily material to the defense of the accused." *Id*.

2012: Texas equates Article 39.14(a) and *Brady*

The materiality standard for purposes of Article 39.14 is the same as that applied in our *Brady* analysis. *Ex parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012). Because the two undisclosed reports were material to Applicant's defense, Article 39.14 does not exempt the reports from discovery. *Id*. (police work-

product exemption does not allow State to withhold reports containing exculpatory or mitigating evidence). This standard is now contained in Article 39.14(h) of the Michael Morton Act. *See* Tex. Code Crim. Proc. Ann. art. 39.14(h)(mandating disclosure of exculpatory or mitigating evidence even without request).

2013: Michael Morton Act passed

Michael Morton Act passes, unanimously, to amend Texas criminal discovery. Acts 2013, 83rd Leg., ch. 49 (S.B. 1611), § 1 eff. Jan. 1, 2014.

2015: Before the Morton Act, analysis of narcotics required a fact issue

In *Ehrke v. State*, 459 S.W.3d 606, 610 – 614 (Tex. Crim. App. 2015), the Court focused on the good cause requirement to obtain inspection of narcotics. This is one of the last pre-Morton cases to interpret the predecessor version of Article 39.14(a). There, "the trial court acknowledged that it was required to allow appellant's counsel to look at the methamphetamine, it did not allow appellant to have the methamphetamine analyzed by an independent chemist." *Ehrke v. State*, 459 S.W.3d 606, 614 (Tex. Crim. App. 2015) (internal citation omitted). While error, it did not result in reversal.

Evidence is material if its omission would create "a reasonable doubt that did not otherwise exist . . .." *United States v. Agurs*, 427 U.S. 97, 112 (1976). The right to inspect the alleged controlled substance is absolute—it requires no further

showing beyond an initial timely request. However, **due process does not** mandate appointment of an expert without "a preliminary showing of a significant issue of fact." *Ehrke v. State*, 459 S.W.3d at 615 (Tex. Crim. App. 2015)(emphasis added). Because the Defendant in *Ekrke* did not make the threshold showing of a significant issue of fact, the trial court did not abuse its discretion in denying appellant's motion as it was related to appointment of an independent expert. *Ehrke v. State*, 459 S.W.3d at 617 (Tex. Crim. App. 2015).

2016: The Seventh Court of Appeals equates the Morton Act and *Brady*

In an early decision interpreting the Morton Act, the Seventh Court of Appeals adopts *Brady* standard for interpreting Article 39.14(a). *Meza v. State*, Nos. 07-15-00418, 07-16-00167-CR, 2016 Tex. App. LEXIS 10690, at *4 – 6 (Tex. App.–Amarillo Sep. 29, 2016, pet. ref'd) (mem. op.)(not designated for publication). The Court relied exclusively upon pre-Morton cases interpreting Article 39.14(a) to reach that conclusion. The Court failed to meaningfully analyze the Morton Act, its legislative history, or the legislative intent before concluding, based on the old cases, that the Morton Act retained the *Brady* standard. *Id*. at *6 – 7.

2017: The Second Court of Appeals equates Morton and *Brady*

Second Court of Appeals adopts *Brady* materiality for purposes of interpreting Article 39.14(a). *Branum v. State*, 535 S.W.3d 217 (Tex. App.–Fort Worth 2017, no

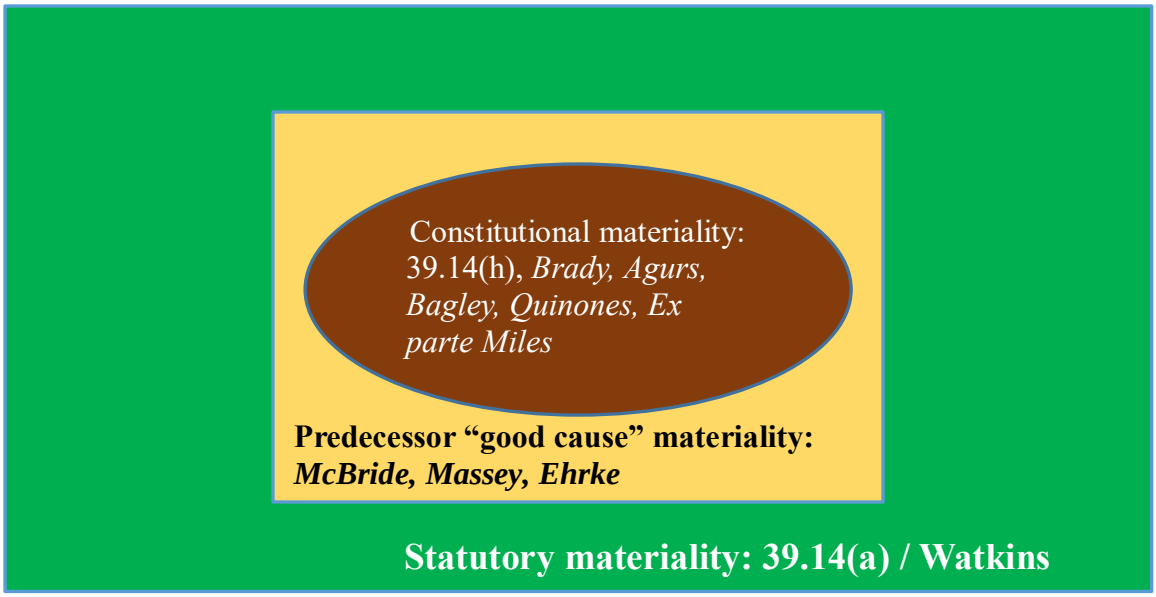
pet.). Here, the Court relies upon *Ehrke*, supra, and *In re Hawk*, 2016 Tex. App. LEXIS 5760, *5, 2016 WL 3085673(orig. proc.)(mem. op.)(not designated for publication). Again, the Court failed to meaningfully analyze the Morton Act, its legislative history, or the legislative intent before concluding, based on the old cases, that the Morton Act retained the *Brady* standard.

Present

Appellant asserts that *Meza*, *Branum*, and *Watkins* are wrongly decided in that they rely on the pre-Morton standard for materiality in interpreting Article 39.14(a).

All evidence that is constitutionally material can fit within the box of evidence for which a Defendant would be able to show good cause to get it. Additionally, any evidence for which good cause could be shown would fit within the category of evidence defined by statute to be material.

The graph (bext page) summarizes Appellant's attempt to reconcile the conflicting standards and cases.



III. Defining materiality post-Michael Morton Act: the standard going forward.

The Tenth Court of Appeals error in applying the pre-Morton definition of materiality gives this Court the opportunity to establish the scope of a defendant's statutory entitlement to discovery of the evidence against them. Each of the cases interpreting the predecessor version of Article 39.14(a) decided whether there was a violation of due process, i.e. a constitutional entitlement to the evidence withheld. These cases, while instructive for interpreting what is now Article 39.14(h), do not assist the Court in deciding whether the withheld evidence in this case was material in the statutory sense rather than the constitutional one.

The correct standard for determining statutory-materiality may be any of those

offered by Black's Law Dictionary, including: "[i]mportant," "having influence or effect," "going to the merits" *See* BLACK'S LAW DICTIONARY, p. 880 (Special Deluxe 5th Ed. 1979). The Tenth Court of Appeals phrased this standard as "any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of a trial." *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App. – Waco, July 25, 2018).

A) *The correct interpretation of the Michael Morton Act requires materiality to have its ordinary legal meaning, not that developed in the post-Brady progeny.*

When interpreting a statute, the Court presumes "that each word, clause, or sentence in a statute should be given effect…" *Ex parte Perry*, 483 S.W.3d 884, 914 (Tex. Crim. App. 2016)(interpreting the scope of the coercion statute). By continuing to use the pre-Morton definition of materiality, essentially an outcome determinative standard, the Tenth Court of Appeals did not give effect to the Legislature's change to the statute. *See Ex parte Trahan*, 591 S.W.2d 837 (Tex. Crim. App. 1979). In contrast to the lower court's choice to use the pre-Morton definition of materiality, adopting a lesser statutory materiality standard than that for constitutional materiality is consistent with the language of the statute, gives effect to the amendment enacted by the Legislature, and is consistent with the Legislative intent evidenced by the enactment of the change in law.

1) The ordinary meaning of materiality gives effect to the amendments contained in the Michael Morton Act.

As discussed in Section I(D)(1), the intent behind the Michael Morton Act was a substantive change in the law as it relates to criminal discovery. To do this, we must recognize that the materiality of a piece of evidence is often unrelated to the disposition of a case. Materiality has multiple legal definitions. These include "[i]mportant," "having influence or effect," "going to the merits" *See* BLACK'S LAW DICTIONARY, p. 880 (Special Deluxe 5th Ed. 1979). Alternatively, "to be 'material' means to have probative weight: i.e., reasonably likely to influence the tribunal in making a determination required to be made."" *Quinones v. State*, 592 S.W.2d 933, 947, (Tex.Cr.App. 1980)(Roberts, J. Dissenting) *citing Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956)). Both the Black's Law Dictionary usage and that adopted in Justice Roberts are consistent with the standard proposed by the Tenth Court of Appeals.

Recognizing the distinction between constitutionally material (i.e. the Due Process Clause requires disclosure) and statutory materiality (lesser standard) allows the Court to give effect to the legislative amendment to Article 39.14(a) while not abandoning precedent. The legislature intended to broaden discovery. This can be

effectuated by expanding materiality to mean any of: relevant, having probative weight, influential, or going to the merits.

2) The ordinary meaning of materiality is consistent with the statutory language.

The Legislature intended something broader than reenacting the constitutional materiality standard contained in the predecessor version of Article 39.14(a). This is further supported by the Committee Report on S.B. 1611: "[t]o ensure fairness and justice, the defense should have access to **all items** of evidence." *See* H. Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 1611, 83d Leg., R.S. (2013) at *4. (emphasis added)[5]

Consistent with the Committee Report on S.B. 1611, the Legislature repetitively used the word "any" in conjunction with various types of evidence subject to disclosure. "[A]ny offense reports" are discoverable. Tex. Code Crim. Proc. Ann. art 39.14(a). Additionally, "any designated documents, papers, written or recorded statements of the Defendant or a witness" are subject to the Act. *Id*. Usage of the serial comma in this list shows the word "any" to modify each of the listed items. *See* Garner, The Elements of Legal Style §2.1, §2.3 (2nd Ed. 2002). Otherwise

[5] Available at https://lrl.texas.gov/scanned/hroBillAnalyses/83-0/SB1611.PDF (last visit 12/17/2018).

stated, the placement of the word "any" at the beginning of the clause reflects the Legislators' choice that any modifies all the words following. "Any designated documents, papers, written or recorded statements of the Defendant" is therefore grammatically identical to "any designated documents, any papers, any written or any recorded statements of the Defendant or [any] witness."

Repetitious use of the word "any" is consistent with the less-than-constitutional materiality standard Appellant proposes. Before the Michael Morton Act, many now-commonly disclosed items were not subject to discovery, including:

1) Witness statements. *See Hoffman v. State*, 514 S.W.2d 248, 252 (Tex. Crim. App. 1974)(witness statements were not discoverable because they were work-product);
2) Chemical analysis of alleged narcotics. *Feehery v. State*, 480 S.W.2d 649, 651 (Tex. Crim. App. 1972)(lab reports were exempted as work product). However, a Defendant was entitled to "inspection" which was exclusive of testing absent a showing of material fact question. *See McBride v. State* 838 S.W.2d 248 (Tex. Crim. App. 1992);
3) Police reports. *See Feehery v. State*, 480 S.W.2d 649 (Tex. Crim. App. 1972) citing *Hart v. State*, 447 S.W.2d 944 (Tex. Crim. App. 1969)("A police officer's arrest report has been held to be excepted by the discovery statute

even though that report is made prior to any investigation conducted by the prosecutor."); and

4) Grand jury testimony. *See Williams v. State*, 493 S.W. 2d 863 (Tex. Cr. App. 1973); *Garcia v. State*, 495 S.W. 2d 257 (Tex. Cr. App. 1973)(Grand Jury testimony exempted from disclosure unless Defendant could show particularized need.)

In contrast, after the Michael Morton Act:

1) Witness statements are specifically discoverable. By amending Article 39.14(a) to include "any written or recorded statements of … a witness" the Legislature broadened the scope of discovery beyond *Brady*-esque constitutionally material items. Tex. Code Crim. Proc. Ann. art. 39.14(a)
2) Chemical analysis / laboratory reports are now specifically discoverable. *Id.*
3) Offense reports / police reports are specifically discoverable. By amending Article 39.14(a) to include "any offense reports" the Legislature broadened the scope of discovery beyond *Brady*-esque constitutionally material items.

This expansion of discovery is consistent with the statement of legislative intent made by the amendments to Article 39.14(a) and evidenced by the legislative intent. *See* S.J. of Tex., 83rd Leg., R.S. 818, 819 (2013); H. Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 1611, 83d Leg., R.S. (2013) at *4.

3) The ordinary meaning of materiality is consistent with the legislative intent

The Michael Morton Act was drafted, in the words of its primary author, because "Michael's tragic case brought to the forefront something that we already knew in Texas, but we too long neglected. Our criminal discovery process in Texas needs serious reform." S.J. of Tex., 83rd Leg., R.S. 818 (2013)(Rodney Ellis statement of intent). Construction of the Act should be adopted that gives effect to the intended change, rather than one that renders the amendment useless." *Ex parte Trahan*, 591 S.W.2d 837 (Tex. Crim. App. 1979) *citing Stolte v. Karren*, 191 S.W. 600 (Tex. Civ. App. San Antonio 1917, writ ref'd); *McLaren v. State*, 82 Tex. Crim. 449, 199 S.W. 811 (1917).

To give effect to the intended change, a different standard for less-than-constitutional violations of the discovery statute is necessary. This Court need not abandon fifty years of precedent to give effect to the Morton Act. By drawing a bright line between constitutionally material evidence subject to Article 39.14(h) disclosure and statutorily material evidence subject to disclosure after an Article 39.14(a) request the Court both gives effect to the amendments to Article 39.14 and provides guidance for both the trial courts and the intermediate courts of appeals.

B) Crafting a remedy for Article 39.14(a) violations.

Appellant offers a standard by which to determine whether evidence is material for purposes of Article 39.14(a), a sanction for non-disclosure, and methods for reviewing evidence alleged to have been erroneously admitted.

1) Materiality standard

"If we were writing on a clean slate to interpret what evidence is "material to any matter," we would be inclined to construe this phrase, at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of a trial." *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App. – Waco, July 25, 2018). Counsel suggests a minimal alteration to the standard suggested by the Court of Appeals. Deletion of "as an exhibit" is sufficient to make this standard functional. This working definition of materiality would include "any evidence the State intends to use … to prove its case to the factfinder in both the guilt and punishment phases of a trial." *See Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App. – Waco, July 25, 2018)(proposing definition of materiality consistent with the amended Article 39.14(a)).

The "as an exhibit" language creates an unnecessary conflict between items of evidence that are not admissible (e.g. police reports) and the statutory language ("any offense reports" are discoverable). Excising the "as an exhibit" qualifier from the

"any evidence the State intends to use" phrase removes that ambiguity.

2) Remedy for, and review of, disclosure violations

Appellant's proposed interpretation of the Michael Morton Act contains four parts: (i) sanctions for non-disclosure, (ii) bifurcated review depending on whether subsection (a) or (h) is violated, (iii) redressing violations of Article 39.14(a), and (iv) redressing violations of Article 39.14(h).

a) Sanction for non-disclosure

To enforce compliance with Article 39.14(a), Appellant proposes adoption of Civil Procedure Rule 193.6, which prohibits use of undisclosed items, as the sanction for a violation of Article 39.14(a). *See* Tex. R. Civ. P. 193.6(a); *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 881 (Tex. 2009)(Discovery that is not timely disclosed is inadmissible as evidence.) Adoption of a civil procedural rule, in the absence of a conflicting criminal rule, is not without precedent. Examples of the criminal code applying civil rules include: taking depositions[6], commitment proceedings for sexually violent offenders[7], judicial recusal[8], and juvenile criminal

[6] *Adams v. State*, 19 Tex. Ct. App. 250, 261 (Tex. Crim. 1885)(depositions controlled by civil rules where not in conflict with criminal rules)
[7] *Stevenson v. State*, 499 S.W.3d 842, 845 (Tex. Crim. App. 2016)(applying Tex. Health & Safety Code Ann. § 841.146 regarding commitment proceedings for violent sex offenders)
[8] *Gaal v. State*, 332 S.W.3d 448, 452 (Tex. Crim. App. 2011)(judicial recusal in criminal cases uses Civil Rule 18b)

cases[9].

Adoption of Rule 193.6 serves two purposes: first, it remedies the statutory violation; second, it does not result in an unjust windfall for the accused in the way a dismissal of the charge or mistrial may. If violation of a discovery rule results in the evidence being inadmissible is sufficient for civil cases, where only money is at risk, certainly it should be the standard where a citizen's very liberty, a fundamental right, is at risk. *See Ex parte Shires*, 508 S.W.3d 856, 864, (Tex. Crim. App. 2016)(Defendant has fundamental right to liberty). Exclusion of the evidence is also a sufficiently harsh sanction to ensure the State is diligent in both its disclosures and its documentation of those disclosures.

Texas has already adopted Rule 193.6 for quasi-criminal cases, including civil asset forfeiture cases. *See F & H Invs., Inc. v. State*, 55 S.W.3d 663, 668 – 669 (Tex. App. – Waco 2001)(applying Rule 193.6 to exclude evidence withheld from discovery during forfeiture proceeding). "The penalty under Rule 193.6 for a party's failure to respond to a discovery request is mandatory exclusion of the unidentified witness or evidence sought." *Id*. *See also Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 914 (Tex. 1992).

[9] *S.D.G. v. State*, 936 S.W.2d 371, 376 (Tex. App. – Houston [14th] 1996)(Juvenile Justice Code controls over conflicting civil procedure rules even though juvenile cases generally governed by Family Code).

Rule 193.6 requires "complete responses to discovery so as to promote responsible assessment of settlement and prevent trial by ambush. The rule is mandatory, and its sole sanction--exclusion of evidence--is automatic, unless there is good cause to excuse its imposition. The good cause exception permits a trial court to excuse a failure to comply with discovery in difficult or impossible circumstances. The trial court has discretion to determine whether the offering party has met his burden of showing good cause to admit the testimony; but the trial court has no discretion to admit testimony excluded by the rule without a showing of good cause." *F & H Invs., Inc. v. State*, 55 S.W.3d 663, 669 (Tex. App. – Waco 2001); *see also* Tex. Code Crim. Proc. Ann. art. 18.18. The same standard should prove viable for discovery violations in criminal cases.

Adopting the Rule 193.6 ban on use of evidence not disclosed during discovery would allow for the Court to have discretion to admit the evidence on a showing of good cause. *Id*. This will almost certainly result in allegations of error in admission of undisclosed evidence. When that occurs, the type of evidence not disclosed (i.e. violation of 39.14(a) versus 39.14(h)) would be relevant to determining the appropriate appellate standard of review. *See generally Smith v. State*, 36 S.W.3d 134, 136, (Tex. Crim. App. 2000)(discussing procedural difference between constitutional and non-constitutional error); TEX. R. APP. P. 44.2(a); TEX. R. APP. P.

44.2(b). This would require bifurcating both standard of review and error analysis depending on the type of discovery violation.

b) Bifurcating standards of review depending on the violation

Appellant proposes the Court draw a clear line between violations of a criminal defendant's statutory authorization to receive discovery (violations of Article 39.14(a)) and violations of a defendant's constitutional entitlement to exculpatory or mitigating evidence (violations of Article 39.14(h)/*Brady*). This requires a separate standard, and separate remedy, for violation of Article 39.14(a) than exists under 39.14(h).

A procedure which bifurcates review of constitutional/*Brady* violations from statutory disclosure violations is also consistent with the text of the statute, which creates different sections for constitutionally-material discovery (39.14(h)) and statutorily-material discovery (39.14(a)). This is consistent with the Supreme Court's continued recognition that, while not constitutionally required, statutory discovery is within the realm legislative action. *See Agurs*, 427 U.S. at 109 ("Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much."); *Kyles*, 514 U.S. at 437 (The Supreme Court has "never held that the Constitution demands an open file policy (however such a policy might work out in practice)…").

At least one court has indicated this framework is possible. *See Bass v. State*, 2017 Tex. App. LEXIS 6646, *5-6, 2017 WL 3081099 (Tex. App – Beaumont, July 19, 2017)(mem. op.)(not designated for publication)(discussing how court should resolve request for discovery related to confidential informant); *In re State*, 2015 Tex. App. LEXIS 12083, *5, 2015 WL 7566519 (Tex. App. – Beaumont, November 25, 2015)(mem. op.)(not designated for publication)(discussing interplay between 39.14(a) and 39.14(h) for discovery that may be subject to a statutory claim of privilege).

Drawing a hard distinction between Article 39.14(a) and 39.14(h) allows the Court to give effect to the change in law made by the Michael Morton Act without overruling sixty years of *Brady* precedent. In addition to providing consistency by perpetuating *Brady* to interpret Article 39.14(h), adopting an interpretation of the Michael Morton Act that distinguishes between *Brady* (constitutional) violations and statutory (non-constitutional) violations allows the Court to create a separate standard for addressing statutory-discovery violations that do not rise to the level of a due process (*Brady*) violation. This is consistent with the Appellate Procedural Rules and how they distinguish between constitutional and non-constitutional error.

c) *Violations of Article 39.14(a)*

If the Court accepts Counsel's argument, an interpretation of Article 39.14(a) is

necessary. Counsel asserts that, using a rubric which distinguishes between violations of 39.14(a) and 39.14(h), error in the admission of evidence not disclosed as required by Article 39.14(a) would be reviewed as a violation of a statutory provision.

Treating violations of Article 39.14(a) as statutory violations is consistent with the *Agurs* and *Kyles*. *See Agurs*, 427 U.S. at 109; *Kyles*, 514 U.S. at 437 (both discussing the absence of a constitutional right to non-*Brady* evidence). Because violations of a statute in this instance does not implicate the constitution, this is non-constitutional error subject to harmless error analysis. *See* TEX. R. APP. P. 44.2(b).

d) Violations of Article 39.14(h) or Brady *violations*

Appellant's proposed definition for purposes of 39.14(a) need not dislodge the existing precedent for *Brady* evidence or *Brady* violations. Appellant asserts that the standard for disclosing constitutionally-material evidence was moved out of Article 39.14(a) and into Article 39.14(h). Appellant proposes that the Court interpret the addition of Article 39.14(h) as a codification of the *Brady* standard that applies the predecessor cases dealing with *Brady*/constitutionally-material evidence. Interpreting Article 39.14(h) as a codification of *Brady* allows the Court to both give effect to the Michael Morton Act and leave intact the precedent interpreting constitutionally-material evidence.

Because Article 39.14(h) deals with exculpatory and mitigating evidence, i.e. constitutionally-material evidence, the Court would treat a violation of Article 39.14(h) as constitutional error. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995)("[O]nce a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review."); *Cook v. State*, 940 S.W.2d 623, 633 (Tex. Crim. App. 1996); TEX. R. APP. P. 44.2(a). This would continue the trend from pre-Morton cases dealing with constitutionally-material evidence.

C) Applying the proposed remedy

Appellant has proposed a new interpretation of Article 39.14(a), an interpretation of Article 39.14(h) that permits the Court to retain its *Brady* / constitutional-materiality precedent, and a sanction for violating the statute. Application to this case follows.

1) Defense counsel filed a timely request for discovery, triggering the State's duty to provide discovery.

Appellant was arrested and indicted for the offense of manufacture/delivery of controlled substance in an amount between 4 and 200 grams, (CR p8, 18). Counsel specifically requested discovery pursuant to the Michael Morton Act, (CR p19 – 20). The request triggers the State's duty to comply. *Davy v. State*, 525 S.W.3d 745, 750 (Tex. App.—Amarillo 2017, pet. ref'd); *Glover v. State*, 496 S.W.3d 812, 815 (Tex.

App.—Houston [14th Dist.] 2016, pet. ref'd). The Clerk Record contains a recitation of the evidence made available to the Defense, signed by both defense counsel and the State, (CR p79 – 81). The punishment exhibits are not referenced, (CR p79 – 81). Because the punishment exhibits are not exculpatory or mitigating evidence, their disclosure is required only after timely request by Article 39.14(a). Disclosure was not required under 39.14(h). Because a timely request for disclosure was made, the punishment exhibits should have been disclosed. *See* Tex. Code Crim. Proc. Ann. art. 39.14(a); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-5.4(e) (4th ed. 2015).

2) The punishment exhibits were material to proving Defendant to be a habitual felon offender.

In order to sentence Appellant as a habitual felon offender, the State would be required to prove the existence of two, final, sequential felony convictions. TEX. PENAL CODE § 12.42(d). To do that, the State used Exhibit P-22 (judgment of conviction and sentence in Cause Number 27974), (RR v10 (part 2) p40 – 47) and Exhibit P-20 (pen packet containing a judgment for a felony conviction and sentence) (RR v10 (part 2) p17 – 24). Because the State would use these exhibits to prove a portion of their case, the exhibits are material as Appellant defines the term, i.e. those exhibits are evidence the State intends to use to prove its case to the

factfinder in both the guilt or punishment phases of a trial. *See generally Watkins v. State* 554 S.W.3d 819, 821 (Tex. App. – Waco, July 25, 2018)(The Court of Appeals offers a definition of materiality consistent with the intent of the Michael Morton Act.)

Further evidencing the materiality of the withheld evidence is the fact that the evidence actually influenced the tribunal in making its decision. Appellant's punishment range was increased using the withheld evidence. "[Appellant] is harmed because his decisions to proceed to trial and have the trial court assess punishment were based in part on the potential consequences." *Pelache v. State*, 294 S.W.3d 248, 252 (Tex. App.—Corpus Christi 2009). These two exhibits related directly to Appellant's possible punishment range. Finally, the increase in punishment was significant. Here, without these exhibits, Appellant's maximum sentence for the second-degree felony offense was twenty years and an optional fine. *See* TEX. PENAL CODE § 12.33(a). After enhancement, Appellant's minimum sentence because twenty-five years. *See* TEX. PENAL CODE § 12.42(d).

3) The State failed to disclose the evidence thereby violating the discovery statute.

During trial, the State asserted that the Michael Morton Act does not apply to punishment evidence, (RR v8 p11 – 18). "At trial, the State argued that the evidence

was not subject to Article 39.14 because it was punishment evidence, but concedes in this appeal that Article 39.14 applies to punishment evidence. Rather, the State now argues that because the documents in question pertained to extraneous offenses, they were not discoverable because extraneous offense evidence is not material to any matter involved in the action. We are not willing to agree with the State's assertions that Article 39.14 does not apply to punishment evidence or that it would never apply to extraneous offenses." *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App. – Waco, July 25, 2018)(internal quotations omitted)(citing trial court record at RR v8 p11 – 18).

If this Court adopts Counsel's proposal to apply Rule 193.6 to the non-disclosure, then the punishment evidence is inadmissible because it was not disclosed after a timely request. *see F & H Invs., Inc. v. State*, 55 S.W.3d 663, 669 (Tex. App. – Waco 2001); Tex. R. Civ. P. Rule 193.6.

This would be significant. State's Exhibit P-22 is the judgment of conviction and sentence in Cause Number 27974, (RR v10 (part 2) p40 – 47). This enhancement made Appellant's punishment range that of a first-degree offense, increasing the minimum from two (2) years to five (5) years, and increasing the maximum from twenty (20) years to ninety-nine (99) years or life. *See* TEX. PENAL CODE § 12.42(b); TEX. PENAL CODE § 12.33; TEX. PENAL CODE § 12.32.

State's Exhibit P-20 is a pen packet containing a judgment for a felony conviction, (RR v10 (part 2) p17 – 24). This enhancement made Appellant's punishment range that of a habitual felony offender, and, increased the minimum from five (5) years, to twenty-five (25) years. *See* TEX. PENAL CODE § 12.32; TEX. PENAL CODE § 12.42(d).

4) Because the Court of Appeals did not rule on preservation or harm, neither harm nor preservation are properly before this Court.

The Court of Appeals did not find error, so they did not reach harm. *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App. – Waco, July 25, 2018). The Court of Appeals refused Appellant's request to rule on preservation of error. *Watkins v. State*, 554 S.W.3d 819, 823 – 824 (Tex. App. – Waco, August 22, 2018)(op. on reh'g). As this Court is aware, in its discretionary review capacity it reviews 'decisions' of the courts of appeals. *Lee v. State*, 791 S.W.2d 141, 142 (Tex. Crim. App. 1990) (citing TEX. CONST. Art. V, § 5; TEX. CODE CRIM. PROC. ANN. ART. 44.45; TEX. R. APP. P. 66.3)). Thus, these issues are not ripe for review. *Id*; *see also Stringer v. State*, 241 S.W.3d 52, 59, (Tex. Crim. App. 2007). Remand to the Tenth Court of Appeals is necessary.

Conclusion

The Court should adopt Counsel's suggestion that the *Brady*-materiality standard was moved from Article 39.14(a) to Article 39.14(h), adopt Rule 193.6 as

a sanction for failing to disclose evidence, adopt Counsel's modification to the Court of Appeals standard for materiality, and remand the case to the Tenth Court of Appeals for consideration of preservation of error and harm.

PRAYER FOR RELIEF

For the reasons stated above, it is respectfully submitted that the Court of Criminal Appeals reverse the Judgment of the Court of Appeals and remand the case to the Tenth Court of Appeals for further proceedings pursuant to TEX. R. APP. P. 43.2(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct electronic copy of the foregoing Appellant's Brief was mailed to Ralph Dewayne Watkins, TDCJ #02096743, 2664 FM 2054, Tennessee Colony, TX 75886 and a true and correct copy has been

electronically filed with the Court and served on both the State Prosecuting Attonrey's Office and the Navarro County District Attorney's Office on the date indicated in the electronic service envelope. I further certify that, within 24 hours of this brief being accepted by the Court, ten (10) file-marked paper copies will be mailed via priority/overnight mail to the Court.

/s/J. Edward Niehaus
J. Edward Niehaus

CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this brief is 12,819. *See* TEX. R. APP. P. 70.3; TEX. R. APP. P. 9.4(i).

/s/J. Edward Niehaus
J. Edward Niehaus

Appendix A

(a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall ~~Upon motion of the defendant showing good cause therefor and upon notice to the other parties, except as provided by Article 39.15, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to~~ produce and permit the inspection and the electronic duplication, copying , and ~~or~~ photographing , by or on behalf of the defendant , of any offense reports, any designated documents, papers, written or recorded statements ~~statement~~ of the defendant or a witness, including witness statements of law enforcement officers but not including ~~, (except written statements of witnesses and except~~ the work product of counsel for the state in the case and their investigators and their notes or report ~~)~~, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that ~~, which~~ constitute or contain evidence material to any matter involved in the action and that ~~which~~ are in the possession, custody , or control of the state or any person under contract with the state ~~State or any of its agencies~~ . The state may provide to the defendant electronic duplicates of any documents or other information described by this article. The ~~order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the~~ rights granted to the defendant under this article do ~~herein granted shall~~ not extend to written communications between the state and an agent, representative, or employee of the state. This article does not authorize ~~State or any of its agents or representatives or employees. Nothing in this Act shall authorize~~ the removal of the documents, items, or information ~~such evidence~~ from the possession of the state ~~State~~ , and any inspection shall be in the presence of a representative of the state ~~State~~ .